INDEX

	PAGE
PETITION FOR REHEARING	1
BRIEF IN SUPPORT OF PETITION FOR REHEARING	4
1. The Power of Congress as Exercised	4
2. The Miller-Tydings Act	6
3. The Doubt as to Constitutionality	6
4. The Realities of Fair Trade Merchandising	7
5. The California and New Jersey Cases Were Prior to the Miller-Tydings Act	8
6. The State Does Not Regulate the Price	8
7. Plaintiff's United States Trademark Should Be Protected in Interstate Commerce	8
8. The Decree Below Merely Interfered with Defendant's Price-Cutting Activities	9
9. Two Principal Systems of Distribution and Merchandising at Retail Level	9
10. The Fifth Circuit Has Sustained a Decree Making Effective an Interstate Pattern of Fair-Trading	11
11. Fair-Trading Increases the Flow of Commerce Between the States	12

Table of Cases Cited

Hutzler Bros. Co. v. Remington Putnam Co., 186 Md. 210, 46A (2d) 101; 163 A. L. R. 890	7
Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, 191 Atl. 873	8
Max Factor & Company v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177	8
Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U. S. 373	8
Parker v. Brown, 317 U. S. 341	5
Schwegmann Brothers v. Calvert Distillers Corp., 184 F. (2d) 11	2, 11
Wilkeson v. Rahrer, 140 U. S. 545	2, 8

PETITION FOR REHEARING

To the Honorable the Judges of the Court of Appeals for the Third Circuit:

The decree of this Court, December 8, 1950, reversed the decree below (Follmer, D. J.) which enjoined retail sales both intra- and interstate of fair-traded Sunbeam razors at less than fair trade prices, and this court limited the decree to intrastate sales, on the ground that since otherwise a grave constitutional question would arise, the Pennsylvania Fair Trade Act should be construed as applying only to intrastate sales.

This court is respectfully asked to decide the constitutional points, a doubt as to which led the court to so construe the Pennsylvania Fair Trade Act, viz: whether said act would be constitutional if applied to interstate sales, and whether the Miller-Tydings Act was constitutional if it left the way open for such fair trade acts. Plaintiff assigns the following grounds:

1. By removing the only obstacle to the free movement of "fair-traded" goods Congress must have intended to make state fair trade acts effective across state lines. The Miller-Tydings Act bears Congress' imprimatur of constitutionality. It should not be denied effect because of doubt. The strong presumption of constitutionality should prevail. Nor should it be overcome by doubts based upon the dictum of doubt in the Whitfield case (297 U. S. 431, 1936), which related to a count in an Ohio indictment for shipping prison-made goods from an Alabama prison.

2. Congress had the power to make an exception to the Sherman Act. The Miller-Tydings Act either left that segment of commerce not "regulated", leaving the field open to non-discriminatory action by the states pursuant to policies believed to be beneficial, or the removal of the Sherman Act prohibition made national policy inapplicable in order to give effect to state policy in respect to "fair trading".

3. The hypothetical case of non-uniform fair trade prices at retail is contrary to the fact. Plaintiff's prices are in fact uniform throughout all the 45 states. This is to be reasonably inferred from the facts of record: the price is fixed and supplements are sent out to each state. Inherent in the subject matter is the requirement that fair trade prices of nationally advertised goods must be uniform within a competitive area.

4. Permitting mail order price cutting would destroy fair trade price structures and gravely limit or wholly wipe out interstate trade in trade-marked goods.

5. The California and New Jersey rulings were prior to the passage of the Miller-Tydings Act. It was unnecessary to reënact the Pennsylvania Act in order to make the Miller-Tydings Act apply. (See *Wilkeson v. Rahrer*, 140 U. S. 545, 565 [1891].) The Miller-Tydings Act was adopted after twelve state fair trade acts had been passed, and in order to make effective those and other like state acts.

6. The Pennsylvania Fair Trade Act does not fix fair trade prices but merely authorizes this to be done on fair-traded goods.

7. Plaintiff's United States trademark is interstate in character and entitled to protection in its interstate operation.

8. The decree below did not interfere with interstate commerce but merely with defendant's price-cutting activities.

9. The Miller-Tydings Act and the fair trade acts of 45 states have resulted in an enormous volume of commerce across state lines in nationally advertised trademarked goods sold in large part in smaller shops in reliance on the manufacturer's trademark and in competition with goods of other manufacturers and the private brands of department stores and other large retail establishments.

10. The Fifth Circuit, in *Schwegmann Brothers v. Calvert Distillers Corp.*, 184 F. (2d) (1950), has upheld an

injunction enforcing a plan to make the fair trade acts effective across state lines.

11. Fair trading increases interstate commerce instead of diminishing it.

This court is respectfully referred to accompanying brief.

Respectfully submitted,

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CERTIFICATE

Ira Jewell Williams, counsel for the Sunbeam Corporation, petitioner herein does hereby certify that the foregoing petition is presented in good faith and not for delay.

IRA JEWELL WILLIAMS.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

1. The Power of Congress as Exercised

As to interstate sales, either the Congress has spoken or Congress has not spoken. If Congress has not spoken, then the act could be unconstitutional only because the Commerce Clause is self-executing and impliedly prohibits the interstate movement of goods shipped under state fair trade laws. This cannot be in respect of non-discriminatory acts pursuant to state policies, deemed for the welfare of the state. But the Congress has spoken. By the Miller-Tydings Act, it has left not merely a void open for state action, but it has carved out an exception to the Sherman Act and its anti-trust policy. It has said that the prohibition of the Sherman Act shall not apply to fair trade acts as to trade-marked goods. The repeal of a prohibition is an effective expression of policy. The power of Congress over commerce and price fixing therein arises under the Commerce Clause which gives Congress power to "regulate" commerce between the states. The Sherman Act was enacted under that clause and relates to interstate transactions only. That is the only way in which Congress has "regulated" that phase of interstate transactions. The Congress is the policy-making power in that interstate field, and it has declared that the Sherman Act policy not apply here. The doubt as to constitutionality does not find sound basis in the doubts in the Whitfield case. The Ohio indictment in the Whitfield case (297 U. S. 431 [1936]) had two counts: (a) one for shipping prison-made goods from the prison in Alabama to a person in Ohio, and the other (b) for the "open market" sale in Ohio of such prison-made goods. (The act prohibited (b) only.) It was as to (a) that the court (Sutherland J.) expressed the Constitutional doubts: and why not, making an Ohio crime out of a shipment *from* an *Alabama* prison? (And the doubt was dictum: the Ohio act did not apply at all.) But the court fully sustained (b), Ohio's power over what happened in Ohio, though the pri-

son-made goods had come in interstate from Alabama, and fully sustained Congress' power so to permit Ohio, whether the goods were in the original package or no, and notwithstanding the previous immunity (under Supreme Court rulings) of goods while in the "original packages". The prohibitive provisions of the Ohio act were sustained as to goods in the original packages *because Congress had power to decide when goods are in interstate commerce*, and had determined that prison-made goods were not in interstate commerce though still in original packages. By the Miller-Tydings Amendment, Congress opened the way for state fair trade acts to become effective before fair-traded goods are loaded to be shipped across state lines. The doubts in the Whitfield case are far afield here. The parallel would be an Ohio statute forbidding shipments of prison-made goods *from Ohio* or forbidding any sales (including interstate sales) of prison-made goods. For in the case at bar, Pennsylvania dealt only with what was done in Pennsylvania, in which state the sales, whether intra- or interstate, are initiated.

In *Parker v. Brown*, 317 U. S. 341 (1942) the Supreme Court sustained the California Agricultural Prorate Act which controlled the prices of raisins, 95 percent of which were shipped in interstate commerce, and which necessarily increased prices thereon. The court said, at page 360:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *South Carolina Highway Dept. v. Thompson*, 313 U. S. 109, 113-114 and cases cited; *Duckworth v. Arkansas*, 314 U. S. 390. A *fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as

state action serves local ends and does not discriminate again the commerce, *even though the exercise of those powers may materially affect it.*"

And again (page 361):

"All of these cases proceed on the ground that the taxation or regulation involved, *however drastically it may affect interstate commerce*, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs." (Emphasis supplied.)

There is no distinction in principle between controlling prices at the level of production but before shipment in interstate commerce (Brown case) and permissive control of prices at retail after production, before interstate commerce begins.

2. THE MILLER-TYDINGS ACT

To deny the applicability of a state fair trade act to interstate transactions from retailer to consumer is to delete from the Miller-Tydings Act the first eight of the following words: "*in which such resale is to be made*, or to which the commodity is to be transported for such resale." The quoted words apply to goods flowing out of and to goods flowing into a state. They expressly cover interstate transactions. Since the Congress has no power over purely intrastate commerce, those eight italicized words are meaningless unless they apply to interstate sales. The Congress, in exercising its power to "regulate" commerce among the states, has given free course to the operation among the 45 states of their fair trade policy.

3. THE DOUBT AS TO CONSTITUTIONALITY

The "grave doubt" (as to constitutionality) is raised by hypothetical illustration of a non-uniform retail price in

different states. This is contrary to the fact and contrary to the reasonable inference from the record facts. The plaintiff's executive committee fixes the price *and supplemental printed price lists are distributed in all 45 states* (see Mr. Ploner's deposition, pages 3 and 4, and sample supplement attached to the complaint). There is no word to suggest that there is anything but uniformity. The point was not raised below. An important and far reaching ruling ought to be based upon facts, not upon what might happen. A manufacturer must enforce its fair trade contracts uniformly in a competitive area: *Hutzler Bros. Co. v. Remington Putnam Co.*, 186 Md. 210, 46A (2d) 101 (1946); 163 A. L. R. 890. To establish different prices in different states within the same competitive area would invalidate agreements in those states. The activities of nationally advertising mail order houses make the entire 45 states one competitive area and require uniformity throughout, in fairness to all retailers in such states.

4. The Realities of Fair Trade Merchandising

To assume that the evils sought to be corrected by the fair trade acts of 45 states can be adequately cared for by giving those statutes local application only is to ignore the realities of merchandising. There are hundreds of thousands of retailers in this country; plaintiff alone has its products distributed through 70,000 retailers. If mail order houses are free to sell at any price across state lines, local retailers will meet or undercut such prices. Since effective enforcement would be impossible with so many retailers involved, the policy adopted by all but three of the states would be completely defeated. It follows that this court's opinion, if it stands, will destroy a merchandising system used by thousands of manufacturers, built up over many years at very great cost in advertising trademarked products.

5. The California and New Jersey Cases Were Prior to the Miller-Tydings Act

When *Max Factor and Company v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936) and *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 191 Atl. 873 (1937) were decided, the Miller-Tydings Amendment to the Sherman Act was not in effect. And, in view of the decision in *Dr. Miles Medical Company v. John D. Park & Sons Company*, 220 U. S. 373 (1911), the state acts could not validly be applied to interstate transactions. Hence the courts of California and New Jersey then limited their fair trade acts so as not to conflict with the Sherman Act. But now the statutes are valid as to interstate commerce, either because the Congress has expressly withdrawn the ban, or because Congress, by abandoning its entrance into that segment of interstate commerce (price fixing of trademarked products), not merely left the way clear for state action, but necessarily evinced its permission therefor. (No need existed for reënactment of the fair trade acts by the states to have the statutes apply to interstate transactions: *Wilkerson v. Rahrer*, 140 U. S. 545, 565 (1891).

6. The State Does Not Regulate the Price

The state does not, as suggested by this court's opinion (page 7), regulate the price at which goods must be sold. It merely permits, but does not require, a manufacturer of a commodity bearing a trademark to fix a minimum resale price to consumers, and thus a standard of equal competition among all dealers handling the trademarked product and relying upon that trademark to enable them to sell the product.

7. Plaintiff's United States Trademark Should Be Protected in Interstate Commerce

Plaintiff's trademark granted by the United States is interstate in character, and is entitled to protection in its interstate operation. The decision of this court is a

charter for vast interstate mail order business to destroy the effect of fair trade laws of 45 states and to nullify their fair trade policies.

8. The Decree Below Merely Interfered with Defendant's Price-Cutting Activities

The decree of the court below did not interfere with interstate commerce; it merely interfered with defendant's price-cutting activities. Defendant's price-cutting is only possible because he operates from his second floor bedroom, with none of the legitimate retailer's usual overhead. Mass merchandising is not practical if confined to bedrooms. Furthermore, if defendant and others can avail themselves, without cost, of the retailing function of constant local display, demonstration and availability of the product, which the legitimate local retailer has already performed and is constantly performing, then the local retailer cannot recover his costs and cannot afford to handle the product. Such predatory conduct by defendant should not be tolerated.

9. Two Principal Systems of Distribution and Merchandising at Retail Level

There are two principal systems of distribution and merchandising at the retail level in the United States: In the first, the retailer acts as the purchasing agent for its customers and the customer relies upon *the integrity of the store* in making its purchases, and in the second, the retailer purchases but the customer relies on the reputation and *the integrity of the manufacturer.*

The integrity of the store system applies principally to large department stores, chain stores and mail order houses, almost all of whom offer goods for sale under so-called private brands or without brands. The customer, having confidence in the store, is not concerned with the origin of the merchandise; the store vouches that it is good. The *name* and *reputation* of the store is the property right

upon which this system depends. Less than 10 percent of all stores, being largely department stores, chain stores and mail order houses account for over 50 percent of the retailing business done in the United States. The balance of the retail business in the United States is done by hundreds of thousands of stores, large and small, but mainly very small, who merchandise under the principle of the integrity of the manufacturer, the goods being identified by the trademarks of the manufacturer, and the customer is primarily sold through the national advertising of the manufacturer. The store, in effect, is the last step in a continuous process which begins with manufacture and ends with delivery of the goods into the hands of the ultimate user. The local retailer makes the national advertising effective by the constant local display, demonstration and availability of the product in his store, where the customer, attracted by the manufacturer's advertising, can examine and judge the product. The trademark of the manufacturer is the key property right upon which this system depends. This court would not permit the defendant to appropriate the name of a competitor, yet the decision here permits him to appropriate and use plaintiff's name without his consent and to its great damage.

The integrity of the manufacturer system is the main competitive factor which limits the tendency of a few large stores to monopolize even larger segments of the retail trade. The ruling of this court in this case will in the long run destroy this system which by its very nature requires a uniformity in price. "Distribution and Service" of the Statistical Abstract of the United States (1948) in Section 32 reveal the following facts with respect to the distribution of goods in 1939: Of 1,770,355 retail stores, one-tenth of 1 percent hired 100 or more employees and did 11 percent of all retail business; 9.6 percent hiring 6 or more employees did 54.2 percent of all retail business; 90.4 percent hiring five or less employees did 45.8 percent of such business. The small stores hiring five or less employees cannot possibly

compete with the remaining 9.6 percent on nationally advertised merchandise unless there is a uniformity of price. In a price war, the large units can always operate more economically than the small units and the latter will quickly be pushed out of the market. The manufacturer and the public both suffer from this because large scale mass production, with the consequently lower price to the general public, can only be scheduled on the basis that there are many stores throughout the United States each stocking and actively engaged in selling the manufacturer's products. Once the remaining portion of the retail market gravitates into the hands of a tiny percentage of all of the stores, such widespread distribution of the manufacturer's products becomes impossible, and there is no longer any nationally advertised price standard to serve as a competitive check on high prices charged by the big stores on their private and unknown brand goods.

10. THE FIFTH CIRCUIT HAS SUSTAINED A DECREE MAKING EFFECTIVE AN INTERSTATE PATTERN OF FAIR-TRADING

In the recent fair trade act case of *Schwegmann Brothers et al. v. Calvert Distillers Corp.*, 184 F.(2d) 11, (rehearing denied September 15th, 1950, certiorari applied for December 8, 1950), in which plaintiff expressly alleged a plan of general interstate action and activity and "without distinction between interstate and intrastate sales sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce between the states which the plan was designed to, and does, make effective", the Court, (Hutcheson, Chief Judge) said (page 13) "that though the sales made by appellants were made intrastate, the transactions, . . . so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them", and affirmed the decree, holding that the Miller-Tydings Amendment "did remove the Sherman Act

as an obstacle in the way of completely effective State action. . . ." The dissent of Judge Russell was on the ground that the defendant as a non-signer was not within the language of the Miller-Tydings Act.

11. Fair-Trading Increases the Flow of Commerce Between the States

Obviously the free flow of interstate commerce is desirable. But the concept means freedom from tariffs or other substantial barriers which would tend unreasonably and unduly to affect the flow of commerce. In this case there is no evidence that fewer of plaintiff's products will be shipped under plaintiff's price structure than under a market demoralized by wild-cat price cutting. Indeed experience shows that the flow will be diminished, not increased, since in the long run price-cutting tends to destroy that mass-merchandising which is the beneficent twin of mass production.

Respectfully submitted,

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[fol. 37] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,280

SUNBEAM CORPORATION, a Corporation

v.

S. A. WENTLING, APPELLANT

SUR PETITION FOR REHEARING

Present: Biggs, Chief Judge and Maris, Goodrich and Hastie, Circuit Judges.

And Now, to wit on January 5, 1951 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Herbert F. Goodrich, Circuit Judge.

(Received & Filed Jan. 5, 1951. Ida O. Creskoff, Clerk.)

[fol. 38] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant and proceedings in this court in the case of Sunbeam Corporation vs. S. A. Wentling, Appellant, No. 10,280, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 10th day of January in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-fifth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)